Powers of Attorney

Ontario

What You Need to Know.
What You Need to Do.

YOU
DECIDE
WHO
DECIDES

SUBSTITUTE
DECISIONS ACT

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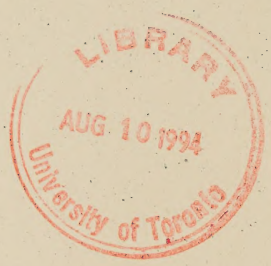
Projet de la prise de décisions au nom d'autrui
Bureau du Curateur public
Ministère du Procureur général
145, rue Queen ouest, 6e étage
Toronto (Ontario) M5H 2N8

This document is also available in alternative formats.



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Contents

This document does not provide legal advice. Rather, this booklet explains the main points of the Substitute Decisions Act *concerning powers of attorney and makes suggestions to help you make best use of it. To make the law easier to understand, the booklet avoids legal terminology wherever possible and omits much detail. For more detailed information about the Act, please contact the Substitute Decisions Project.*

Making Decisions

What am I going to eat? Where will I live? How will I manage my finances and property? What kind of health treatment will I receive?

Right now, most of us make these decisions for ourselves. But what if you became mentally incapable? Who would make these decisions for you?

That's a question you should think about now.

Ontario's laws have been updated to give you more control of who will decide for you. The *Substitute Decisions Act,* which was passed with the support of all parties in the legislature after many public hearings, will come into force in early 1995. This new law says that you can choose someone in advance to make decisions for you when you are no longer mentally capable. The law covers two areas of decision-making — decisions about property (or finances) and decisions about your personal care. Decisions about property include such things as paying your bills and looking after bank accounts. Decisions about personal care include such things as health care, what you eat, where you live, clothing, cleanliness, and safety.

To choose your substitute decision-maker and make sure that person has legal authority to make decisions for you, there are certain things you should know and certain things you should do:

What You Need to Know:

- Whom do you want as your substitute decision-maker?
- Who can be a substitute decision-maker?
- What are his or her responsibilities?
- What kind of instructions can you give?

What You Need to Do:

- Consider obtaining advice from a lawyer or other trusted expert.
- Choose your decision-maker.
- Make a power of attorney saying who this person is.
- Specify what instructions you want him or her to have.
- Sign the power of attorney and have it witnessed.
- Notify certain people that the document exists.

This booklet helps answer many of your questions by providing information about what you need to know and what you need to do. It offers suggestions about things to think about when choosing your substitute decision-maker. It tells you how to give your substitute decision-maker the legal authority to make decisions for you. And it helps you think about the kinds of instructions you might want to give your substitute decision-maker.

This booklet is just one part of a public education campaign designed to help you make the best use of the *Substitute Decisions Act.* For more information about the Act, please contact the Office of the Public Trustee.

You Decide Who Decides

What if I become mentally incapable of making my own decisions? This is not a question that many of us want to ask — let alone answer. But planning for that possibility could be one of the most important things you, your family, and friends can do for your peace of mind.

Current law allows you to choose someone to look after your *financial* affairs if you become mentally incapable. The *Substitute Decisions Act* allows you to do that in much the same way you can today. Now, for the first time in Ontario, this new law also gives people the legal authority to plan ahead in the area of *personal care*. Under the Act:

- You will be able to choose those you trust to make decisions for you in the areas of finance *and* personal care.
- You will be able to explain your values and wishes in advance to make it easier for people to make difficult decisions for you.

The way to give someone you trust the legal authority to make decisions for you is by giving a power of attorney. A power of attorney is a legal document in which one person may give another person the authority to make decisions for them if they become mentally incapable. You may make separate powers of attorney for each of the two areas of decision-making — finance

and personal care. The new law in Ontario has different rules for each.

Having a power of attorney for finances has always been a good idea. Under existing law, if you become incapable and you have not made a power of attorney, your family could have to go to court for the authority to manage your affairs.

The new law will make that process easier for your family by providing options that don't involve going to court. In addition, *The Consent To Treatment Act* (a related law which will come into effect at the same time as the *Substitute Decisions Act*) will enable family members to make decisions about medical treatment for an incapable person. No court order or power of attorney will be necessary for this to happen. But the simplest and surest way to make sure someone you trust will be able to look after your affairs is by making a power of attorney.

While it's very important to make a power of attorney, no one can make you sign one if you don't want to. For example, you cannot be required to make a power of attorney in order to go into a long-term care facility or hospital.

Giving a power of attorney is a very serious matter. There is always some risk that it could be misused. If you choose to make a power of attorney, it is important that you do so of your own free will and not because of pressure from anyone else.

But remember, if you don't make a power of attorney, someone may have to be formally appointed some day to make decisions

What does "mentally incapable" mean?

Under the Act, "mentally incapable" means a person cannot understand information that is relevant to making a decision or can't appreciate what is likely to happen if a certain decision is made or if a decision isn't made. This incapacity could be caused, for example, by an accident or an illness. Incapacity can be a temporary or permanent condition.

Incapacity may affect decisions about property or decisions about personal care. For example, a person who is incapable of managing his or her finances may be perfectly capable of making decisions about personal care. Or a person may be capable of making some personal care decisions, like what to eat and what to wear, but not others – like a complicated health care decision.

for you if the decisions involve matters other than medical treatment. If that person, called a guardian, is appointed without your prior approval, the law continues to protect your interests by requiring certain safeguards, including the posting of security for a guardian of property. The Court can either waive or reduce the requirement for security.

If no one close to you is available and willing to become your guardian, there is some possibility that the Office of the Public Guardian and Trustee may have to make decisions for you.

Decisions About Property

If I become mentally incapable, who will pay my bills and my taxes? Who will look after my bank accounts? Who will manage my real estate and investments? The person you choose as your attorney will take care of these things for you.

Choosing Your Attorney for Property

The first thing to do is to choose an attorney for property. An attorney is someone who will make decisions for you when you are no longer mentally capable. The word "attorney" does not mean "lawyer." The attorney can be a relative, a friend, or someone else. You can choose anyone you want as your attorney as long as he or she is at least 18 years old.

Many trust companies are prepared to act as attorney. They charge a fee for this service. Some individuals choose this option because they want an attorney who is professional and impartial.

Choose Carefully

To help you decide who your attorney should be:

- **Think about the person.** Does he or she know anything about money matters? Will your attorney accept the responsibility?

Do you know the person well? Do you trust him or her completely with your financial decisions and management of your property?

- **Talk to the person.** Ask that person whether he or she is willing to be your attorney. Talk about what the responsibilities will be. Explain why you are doing this. Discuss how you want your affairs handled. Take the time to think about your choices.
- **Consult with other people.** Before you decide, you may want to talk to your family or close friends. Although you are not required to consult with a lawyer, it is a good idea. You may also want to talk to a financial planner or other trusted advisors providing they are impartial and concerned only with your best interests.

You Can Name More Than One Attorney

You can name more than one person to be your attorney for property. If you do this, you may decide they will share the job or divide their responsibilities. Or, you could name one person as your attorney and another person as a substitute or backup, who could step in if your first choice resigns, gets sick, or dies.

But if you name two people to be your attorneys and do not say how they should make your decisions or who should make which types of decisions, the law says they must make all your decisions together.

If you decide that your attorneys are going to make decisions together, it's a good idea to specify how disagreements get resolved. You might say that in a case of conflict, one attorney's decision will override the other's. Otherwise, your attorneys might have to go to court and the judge will have to decide.

Your Attorney Has Responsibilities

For example, your attorney must:

- act with honesty and integrity and in good faith, for your benefit.
- explain to you what the powers and duties of an attorney are.
- encourage you to participate, to the best of your abilities, in decisions about property.
- foster regular personal contact between you and those family members and friends who are supportive of you.
- consult from time to time with your supportive family and friends and with whomever is providing personal care to you.
- put your financial needs first. If there are funds left over, the needs of your dependents are the next priority. After that, if there is still money left over, it may be spent to satisfy your other legal obligations.
- keep accounts of all transactions. There are guidelines for how money may be spent on gifts, loans, and charitable donations.

Payment

You can decide whether or not your attorney gets paid. Under the new law, attorneys are entitled to payment, and the amount they get is based on a set rate that will be specified in the legislation. However, if you want your attorney to get paid more or less than the set rate, or nothing at all, you can write that in your power of attorney.

Making Your Continuing Power of Attorney

Once you've decided who you want as your attorney, you can make a continuing power of attorney. A continuing power of attorney for property is different from other types of powers of attorney because it can be used after the person who gave it is no longer mentally capable. A continuing power of attorney for property can cover decisions about all kinds of financial matters — except the making of a will.

Who Can Make a Continuing Power of Attorney for Property?

It's important to know that not everyone can make a continuing power of attorney for property. There are certain rules. For one, you have to be at least 18 years old. And you have to:

- know what property you have and its approximate value.
- be aware of your obligations to those people who depend on you financially.
- know what your attorney has the authority to do.
- know that your attorney must account for all the decisions he or she makes about your property.
- know that, if you are capable, you may cancel your power of attorney.

- understand that unless your attorney manages the property prudently, its value may decline.
- understand that there is always the possibility that your attorney could misuse the authority.

If You Already Have a Power of Attorney, Make Sure It's Valid

Many people have already given a power of attorney to be used if they become incapable. If that's the case for you, you probably won't have to make a new one. But to make sure that the power of attorney you have now will be valid as a continuing power of attorney when the new law takes effect, you should check two things:

- Does it include a clause that says "In accordance with the *Powers of Attorney Act*, I declare that this power of attorney may be exercised during any subsequent legal incapacity on my part."? If it doesn't, it won't be valid as a continuing power of attorney, and you should make a new one.
- Does it cover all the aspects of your finances that you want covered? Some existing powers of attorney are limited to certain bank accounts. This kind of power of attorney can probably still be used when the new Act comes in. But your attorney won't have authority to make decisions about the rest of your property. Think about whether that is a concern for you. If it is, you may want to make a new power of attorney that covers all your property.

What is the difference between a will and a continuing power of attorney?

A will is very different from a continuing power of attorney for property. A will expresses what will happen to your property after you die. A continuing power of attorney for property is only effective while you are alive. It allows you to control decisions about your financial affairs by choosing the person you want to make those decisions when you become incapable of making them yourself.

By the same token, the rules that will apply to attorneys appointed under the new law will apply equally to attorneys appointed before the Act comes into effect. This is important for your protection. The new law is clear and specific about how your attorney must act in your interest.

A Continuing Power of Attorney Can Take Effect in Two Ways

When you make your continuing power of attorney, you can do it in two ways. First, you can make the power of attorney take effect only after something specific happens. For example, you can say that it won't take effect until you become mentally incapable. You can specify how that will be determined. Second, you can make the power of attorney effective immediately. That doesn't always mean that it will be *used* right away. For example, some people choose to give the power of attorney to a trusted third person, such as their lawyer, accountant or financial advisor to be held in safekeeping. Written directions saying when the power of attorney may be released to the attorney can also be provided.

Giving Your Attorney Authority

You may give your attorney the authority to make any types of decisions related to your property that you could make yourself — except make a will. Or you may limit your attorney's authority. For example, you may say that your attorney cannot deal with certain of

your assets. However, in future, if something has to be done with these assets and your attorney does not have the authority to do it, he or she may have to apply to become your guardian.

You can put conditions and restrictions in your continuing power of attorney. You could say, for example, that your attorney cannot make certain investments or loans. Remember, however, that circumstances change. For instance, you could make your attorney save a nest egg because you want to will it to someone. But your money might run low and your attorney won't have it for your care.

Think about whether you wish to limit the flexibility of your attorney.

Does my attorney have to apply to the Public Guardian and Trustee before acting?

No. The only restrictions on when your attorney can begin to act are those you include in your power of attorney.

Will my attorney have to provide security or file a management plan?

No. An attorney does not have to provide security or file a managment plan.

Decisions About Personal Care

If I become mentally incapable, who will decide where I live? How I dress? What I eat? What health care I receive? How I keep safe? Under the *Substitute Decisions Act*, the person you choose as your attorney for personal care will make these decisions for you.

Choosing Your Attorney for Personal Care

Choosing your attorney for personal care is much the same as choosing your attorney for property. Remember, the attorney does not have to be a lawyer.

Choose Carefully

When choosing an attorney for personal care:

- **Think about the person.** Does he or she know you well enough to make personal care decisions for you? Do you trust your attorney to accept the responsibility and follow your instructions or wishes even if he or she may disagree with what you want?
- **Talk to the person.** Ask that person whether he or she is willing to be your attorney. Talk about what the responsibilities will be. Talk

about why you are doing this. Discuss your instructions. Take the time to think about your choices.

- **Consult with other people.** You are not required to consult a lawyer, but it is a good idea to do so. You may also want to talk to your doctor, especially if you have complex health concerns. A discussion with your close family is also a good idea.

You can make the same person your attorney for both personal care and property, if they meet the requirements for both. But you should think about whether that person is suitable to make decisions in both areas. A person who can make decisions about your health care, for example, may not know a lot about finances.

Your Attorney Has Responsibilities

For example, your attorney must:

- act honestly and in good faith.
- as far as possible, try to help you become independent.
- choose the least restrictive, least intrusive course of action that is available and appropriate.
- explain to you what powers and duties the attorney has.
- encourage you to participate in your personal care decisions.
- try to establish regular personal contact between you and those family members and friends who support you.
- consult from time to time with supportive family and friends, and with whomever is providing you with personal care.

Who can be your Attorney for Personal Care?

There are a few rules about who can and who cannot be your attorney. He or she must be at least 16 years old. A person who is providing you with health care or residential, social, training, advocacy, or support services for compensation cannot be your attorney, unless he or she is your spouse, partner, or relative.

For example: If you live in a long-term care facility, you can't give your power of attorney for personal care to one of the staff who are paid to look after you, unless that person is your spouse, partner or relative. You also can't give it to someone who is paid to provide you with support services in your home, unless that person is your spouse, partner, or relative.

- follow the instructions and wishes you made when you were capable, unless it is impossible to do so.

Making Your Power of Attorney for Personal Care

Now that you've chosen your attorney, you can make a power of attorney for personal care. It can cover all kinds of personal care decisions like choices about health care, nutrition, shelter, clothing, hygiene, and safety. The authority you give can cover all or only some of these areas.

When a Power of Attorney Can Be Used

This kind of power of attorney cannot be used until a person is mentally incapable of making personal care decisions. It's not like a power of attorney for property, where you can choose whether it will be effective immediately. No special procedure is required to use a personal care power of attorney if you do not object and if your attorney:

- has reason to believe you are incapable of making the decision.
- has explained to you why a decision is necessary and what the decision is.
- tells you that you have the right to object.

Then your attorney can go ahead and make the decision.

If your attorney wants to make certain decisions even though

you object to them, your attorney must get the power of attorney validated by the Office of the Public Guardian and Trustee.

Instructing Your Attorney for Personal Care

It is important to think about what kinds of instructions, if any, you would like to put in your power of attorney for personal care. You could give instructions about where you want to live, what kinds of foods you would like to eat, or what you want to wear. You can also give instructions about medical treatment. For instance, you may give your attorney the authority to allow or refuse treatment for you. Your attorney must follow the instructions and wishes you made when you were capable, even if you didn't write them down. If it is impossible to follow your wishes or instructions, your attorney must make a decision in your best interests. He or she must consider the values and beliefs you held while capable and any current wishes you may have, if the attorney can find out what they are.

How to Write Your Instructions

There are many things to keep in mind when writing instructions about medical treatment.

- **Put your instructions in words your attorney can understand.** For example, if you tell your attorney you don't want any "heroic measures" to keep you alive, your attorney might not

Why make a power of attorney now?

Even though the Act is not yet in effect, you can make a power of attorney for personal care now. You may want to do this if you are concerned that you may become incapable before the new law is in force, or if you are concerned about unexpected events. The power of attorney — as well as your substitute decision-maker — will be recognized when the new law is in effect.

Who can make a power of attorney for personal care?

You have to be at least 16 years old, able to understand whether the attorney has a genuine concern for your welfare, and appreciate that the attorney may need to make personal care decisions on your behalf.

know what that means. Try to give examples of what you want or don't want to happen and under what circumstances.

- **Explain your instructions.** You might think of saying, for example, that you don't want to be "hooked up to a machine." Remember, breathing machines can be used temporarily in emergencies or during surgery. That's not the same as being dependent on a machine to live.
- **Be clear and specific.** You may want to give certain instructions depending on the physical or mental condition you might be in and whether the condition is permanent. Think about whether you want different degrees of treatment in different circumstances. For example, if you are conscious or unconscious, physically mobile or bedridden, able or unable to recognize loved ones.
- **Be aware of the different degrees of illness or condition.** For example, you might give instructions in case you have a stroke. But you may have a mild stroke or a very severe one. Your instructions might be quite different, depending on the quality of life you might have after the stroke. You should also be careful about the instructions you give about medication. For example, you might have a very serious infection that could kill you, but it may be easily treated with an antibiotic.
- **If you've already made a living will or advance medical directive, you can make it part of your instructions.** Living wills and advance medical directives are documents people write

that say, in advance, the types of medical treatment they would choose or refuse if certain things happen when they cannot make decisions themselves. Your power of attorney may include these documents.

- **Discuss your instructions with your attorney.** Make sure your attorney understands your instructions. Talk about your values and wishes. If you decide to give instructions about medical care, talk to your doctor about your health and what kinds of medical treatments you might face. You should also talk to whomever is providing your health care.

You Don't Have to Give Instructions

You don't have to give instructions in your power of attorney for personal care, if you don't want to. You may decide to let your attorney make decisions for you as best he or she can in the circumstances. If that's what you decide, it is very important to talk to your attorney — or any people close to you — in advance about your values and wishes. The reason for this is that if there are no personal care instructions, your attorney must try to find out if you expressed wishes some other way, either spoken or written, while you were mentally capable. These discussions can be very helpful when difficult decisions must be made on your behalf in the future. If there is no way of knowing what you would have wanted to do, then the attorney must make a decision in your best interests.

Talk to your attorney!

No written words can ever replace discussion with your attorney, and no form can ever anticipate all of the possible decisions that your attorney might have to make for you.

What to Do Now

Once you've chosen your attorney(s) and you have decided what your instructions should be, it's time to make your powers of attorney.

The law does not require any special format for powers of attorney, as long as they contain certain information and are properly signed and witnessed.

Power of attorney forms are available from the Public Trustee's office. In addition, a lawyer can prepare powers of attorney for you or help you complete them.

When you've filled out the forms, sign them and have them witnessed by two people who are there when you sign. The witnesses must have no reason to believe that you are mentally incapable of giving a power of attorney. Some people are not allowed to be witnesses.

What to Do with Your Power of Attorney

You may wish to have it reviewed by an expert advisor. If it is not completed properly it may not be valid.

It's a good idea to let people know that you've made a power of attorney because you may not be able to tell them about it when you are incapable. You should therefore let anyone who will have to

deal with your attorney(s) know who he or she is, how to make contact, and who has copies of the documents.

Depending on the type of power of attorney you made, it is advisable to tell your family, lawyer, any financial institutions you deal with, health care providers, and anyone else who provides you with care who your attorney is and his or her address and telephone number. Remember to update them regarding any change in your attorney's address or telephone number.

You may give the original documents to your attorney(s) or keep them in a safe place where the attorney(s) can locate them quickly if necessary. Alternatively, you may leave the documents with a trusted third person with written directions as to when they may be released to the attorney.

It is a good idea to keep at least one photocopy of the document. If possible, keep it with you together with the current address and telephone number of your attorney(s).

You Can Revoke Your Power of Attorney

You can revoke a power of attorney for property at any time as long as you are mentally capable of making one. You do this in writing, in front of two witnesses. The rules on who cannot be a witness are the same as those for making a power of attorney.

There are two ways to revoke a power of attorney for personal care. If the power of attorney is not "validated," then the process of revoking it is the same as for property. If it is validated, the valida-

Who can't be a witness?

- the person you've chosen as your attorney, or their spouse or partner
- your spouse or partner.
- your child or a person whom you treat as your child
- a person whose property is under guardianship or a person who has a guardian of the person
- a person who is under 18 years old

tion has to be cancelled before the power of attorney can be revoked. Validation is a process by which your attorney can confirm that you are incapable and receive written proof of his or her authority from the Office of the Public Guardian and Trustee. A power of attorney that is validated can be used even if you disagree with the decisions made by your attorney. Validation can be cancelled if you are no longer incapable.

If you revoke a power of attorney for property or personal care, make sure to notify everyone to whom you've given copies of the documents or told about your powers of attorney, including your financial institutions and caregivers. It's a good idea to keep a separate list of these people.

If there have been big changes in your life, review your powers of attorney. For example, you may wish to review your choice of attorney if you marry, separate, or divorce.

You should review your power of attorney for personal care if your health changes – perhaps you develop an illness or a condition that affects your instructions. Review your continuing power of attorney for property if your financial situation changes.

Finally, if you are leaving Ontario, find out if your continuing power of attorney for property or your power of attorney for personal care will be valid where you are going. Consult with a lawyer, your insurance company, or those organizations that specialize in providing this kind of information and these services.

Notes

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